United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2120

To be argued by
ALFRED S. JULIEN

In The

United States Court of Appeals

For The Second Circuit

DORMAN L. BAIRD and DORIS J. BURNS, as Administratrix of the Goods, Chattels and Credits which were of WENDEL M. BURNS, deceased, and DORIS J. BURNS, individually,

Plaintiffs-Appellants,

- against -

DAY & ZIMMERMAN, INC., REVERE COPPER & BRASS, INC., and LEAR SIEGLER CO. INC.,

Defendants,

- and -

HARVEY ALUMINUM (Incorporated),

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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PLAINTIFFS-APPELLANTS' REPLY BRIEF

Preliminary Statement

Plaintiffs-appellants are submitting this brief in reply to the brief of defendant-appellee Harvey Aluminum (Inc.). The facts are fully set forth in the main brief. At the outset we wish to emphasize that in considering whether there is jurisdiction over Aluminum, the court should consider all of its activities and those of its subsidiary, Harvey Aluminum Sales, Inc. and its parent, Martin Marietta Corporation, together. In other words, activities which by themselves would not be sufficient under New York's "doing business" standard, together do constitute doing business such that the court has jurisdiction.

Argument

Harvey Aluminum (Inc.) is sufficiently doing business in the State of New York to permit a New York court to exercise jurisdiction over it.

New York's "doing business" test is virtually identical to the most permissible one allowed under the United States Constitution. As stated in Frummer v. Hilton Hotels Internat'l. Inc., 19 N.Y. 2d 533, 536-7 (1967):

". . . due process requirements are satisfied if the defendant foreign corporation has "certain minimum contacts with (the State) such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' ". (International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S.Ct. 154, supra. . . ."

The reliance on the International Shoe Company case shows the intent of the New York court to adopt a broad interpretation of doing business since International Shoe sets forth the minimum contacts necessary for jurisdiction to be exercised. Cases cited by Aluminum in its brief (footnote p. 10) for the proposition that New York has not extended the doing business standard to the full extent permitted by the United States Supreme Court are cases decided before Frummer (with the exception of Meunier v. Stebo, Inc., 38 A.D. 2d 590, 328 N.Y.S. 2d 608 (2nd Dept.) which does not discuss New York's application of United States Supreme Court jurisdiction cases.) As we stated in our main brief (p.20) this court in interpreting the New York decisions has held that "the 'doing business' standard is practically

equivalent to the most permissible one that the Constitution will allow". (Beja v. Jahangiri, 453 F. 2d 959, 961 (2nd Cir. 1972)).

Aluminum should be considered subject to New York's jurisdiction on the basis of the New York activities of its wholly owned subsidiary, Sales. Sales was Aluminum's agent. (See plaintiff's Brief, pp. 6 A-8; 15-16). The agreement which creates this agency, after providing that Sales is to use its best efforts to sell and promote Aluminum's products and to provide technical, engineering and liaison services for customers (Provision 2), states:

> "3. Aluminum Sales shall carry on the foregoing activities in such manner as shall appear to it to best accomplish the purposes expressed in Provision 2." (J.A. 68).

From this paragraph it is clear that Aluminum has given Sales wide discretion in acting for it. As Aluminum describes in its brief, the presence of discretion on the part of the one claimed to be the agent is significant in determining whether the agent's activities will result in the Court's exercise of jurisdiction over the

absent principal (Aluminum Brief pp. 15, 17).

The court below concluded that Sales was an independent contractor because it could not confirm or accept sales and that consequently there was no agency relationship between Sales and Aluminum necessary for jurisdiction. (J.A.71; Aluminum Brief p.17) Actually, Sales can be an independent contractor and an agent,and if it is an agent there will be jurisdiction in spite of the fact that it is an independent contractor (Ackert v. Ausman, 29 Misc. 2d 962, 218 N.Y.S. 2d 822 (Sup. Ct 1961); Aff'd.without opinion 20 A.D. 2d 850, 247 N.Y.S. 2d 999 (First Dept.). In Ackert the court found "Mutual",an out-of-state company,subject to its jurisdiction based on the acts of "IDS". The court stated:

> ". . .it is not material that the contracts between Mutual and IDS designate IDS as an "independent contractor". An agent may be an independent contractor; the terms are not mutually exclusive. (See, Restatement of the Law, Second, Agency 2d, Section 2, comment (b), p. 13: "An agent who is not a servant is, therefore, an independent contractor when he contracts to act on account of the principal.") In Melvin Pine & Co., Inc v. McConnell, supra, the corporate representatives in New York of the foreign defendant

> were "independent contractors to some extent and maintained their own offices and business facilities" (273 App. Div. 218, 76 N.Y.S. 2d 283); nevertheless, they were held to be agents, whose activities in New York subjected the defendant to the service of process." (218 N.Y.S. 2d at 827).

In our case, the agreement between Aluminum and Sales also calls Sales an independent contractor (J.A. 68; Aluminum Brief (p.6.). As explained in Ackert, the use of the term "independent contractor" in the agreement does not prove that Sales is not Aluminum's agent.

Aluminum argues that Section 1314 (b) of New York's Business Corporation Law precludes this court from asserting jurisdiction against Aluminum. (Brief, p. 24) Actually, all this Section does is codify the "doing business" test for establishing jurisdiction (see subdivision 5 of Section 1314 (b)). It does not narrow New York's definition of doing business as described in decisions of the New York courts.

Plaintiffs do not concede (as claimed in Aluminum's brief, p. 19) that Bryant v. Finnish Nat'l Airline, 15 N.Y. 2d 426, (1965) is "inapposite." As we explain in our main brief, the only distinction between our case and Bryant is that in our case the presence of the out-of-state company results from the operation of its wholly owned subsidiary in New York while in Bryant the out-of-state company had its own employees in New York. This distinction does not matter once we establish that the subsidiary is the out-of-state company's agent (see plaintiffs' brief, pp. 15-16).

One of the other reasons for asserting jurisdiction over Aluminum is that its own employees undoubtedly came into New York to consult with executives of its parent, the Martin Marietta Corporation, during 1971 and earlier. (Plaintiffs' brief, pp. 9-10). This consultation was in connection with over $1,000,000.00 in management service fees paid by Aluminum to Martin Marietta Corporation in 1971 and similiar fees paid earlier. Plaintiffs proved such trips in 1972 and 1973 in connection with similiar services (J.A. 47) From these later trips, there can be an inference

that such trips took place during 1971 and earlier, since there is no apparent material change in the circumstances surrounding these trips between the two years, and the period of time proved is close enough to the period for which the inference is sought. (McFarland v. Gregory, 425 F. 2d 443, 447 (2nd Cir. 1970). Thus evidence of 1972 and 1973 trips is not irrelevant as claimed by Aluminum in its brief (p. 21).

Conclusion

For the above stated reasons, and the reasons stated in plaintiffs' main brief, the judgment of the Court below dismissing the action with respect to defendant, Harvey Aluminum (Incorporated), should be reversed on the grounds that, as a matter of law, a New York Court has jurisdiction over that defendant.

Respectfully submitted,

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JESSE ALAN EPSTEIN

Of Counsel

us US COURT OF APPEALS: SECOND CIRCUIT

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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortega, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 18ht day of December 1974 at 140 Broadway, New York

deponent served the annexed Reply Brief upon

Dewey, Ballantime, Bushby, Palmer & Wood

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 18th day of December 19 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975